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In the Supreme Court of the United States

October Term, 1981

PANHANDLE EASTERN PIPE LINE COMPANY AND NATIONAL HELIUM CORPORATION, *Petitioners,*

vs.

MOBIL OIL CORPORATION, ET AL., and RALPH GROUNDS, ET AL., *Respondents,*

and

UNITED STATES OF AMERICA, *Intervenor.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Tenth Circuit Court of Appeals has violated petitioners' rights under the Fifth Amendment to the United States Constitution and failed to follow the decision of this Court in *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974) by holding void contract provisions relating to the sale of and the right to extract helium and substituting therefor its own scheme of utility type rate making?

II. Whether the Circuit Court of Appeals violated Rule 52(a) of the Federal Rules of Civil Procedure and *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) in creating a contract for the benefit of third parties which would result in millions of dollars being paid to thousands of producers and royalty owners when such theory of recovery was not raised in the trial court and findings of fact by the trial court were directly contrary to the existence of a contract for the benefit of third parties?

III. Whether findings of fact and conclusions of law with respect to a claim in quantum meruit for the reasonable value of helium asserted under the law of Texas may be applied by the Circuit Court, through the device of the "Law of the Case Doctrine," as to claims in quantum meruit for the reasonable value of helium asserted under the law of Kansas where the parties and the significant facts in the two cases are not the same?

PARTIES BELOW

Throughout the proceedings below, the parties have for convenience been categorized as follows:

Petitioners were included in a group of natural gas pipeline companies and helium extraction companies referred to as the Helex Group.[1]

The second group, referred to as the lessee-producers group, includes numerous named parties as representatives of more than 500 independent producers who produce natural gas containing helium for sale to natural gas pipeline companies.[2]

A third group consists of oil and gas royalty owners and is referred to as the landowners group.[3]

The United States was allowed to intervene in the action as a party plaintiff.

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1. Panhandle Eastern Pipeline Company; National Helium Corporation; Northern Natural Gas Company; Cities Service Cryogenics, Inc.; Northern Helex Corporation; Northern Natural Gas Products Company; Cities Service Gas Company; Cities Service Helex, Inc. The parents and subsidiaries of National Helium Corporation and Panhandle Eastern Pipe Line Company are listed in Appendix QQ.

2. Cabot Corporation; Helmerich & Payne, Inc.; Texaco, Inc.; Ashland Oil & Refining Company; Dorchester Gas Producing Company; Mobil Oil Corporation; Cities Service Oil Company; Gulf Oil Corporation; Pan American Petroleum Corporation; Diamond Shamrock Corporation; Superior Oil Company; Mapco Production Company; Phillips Petroleum Company; Amoco Production Company; Atlantic Richfield Company and El Paso Natural Gas Company.

3. This group of landowners is made up of over 1,000 named parties purporting to represent the more than 30,000 persons who granted the oil and gas leases under which the natural gas involved was produced. Such parties are listed in Appendix PP.

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OPINIONS BELOW

The United States District Court for the District of Kansas rendered an unreported opinion concluding that it had jurisdiction of the interpleader actions involved herein. The decision of the Court of Appeals for the Tenth Circuit affirming the decision *per curiam* (App. A309)[1] is reported at 327 F.2d 1003. Thereafter, the

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1. Citations to "App." refer to the separate appendix that accompanies this Petition for Writ of Certiorari, pursuant to Rule 21.1(k) of this Court.

District Court bifurcated the cases into the liability phase and the damages or value phase. The opinion of the United States District Court for the District of Kansas on the merits of the liability phase (App. A170) is reported at 292 F. Supp. 619. The opinion of the Court of Appeals for the Tenth Circuit on the merits on the liability phase (App. A133) is reported at 441 F.2d 704. Petitions for certiorari filed by the landowners and by the Helex Group were denied by the Supreme Court, *Grounds v. Northern Natural Gas Co.*, 404 U.S. 951 (1971) and *Northern Natural Gas Co. v. Mobil Oil Corp.*, 404 U.S. 1063 (1972), respectively. Justices Stewart and Blackmun would have granted the petitions.

The opinion of the District Court for the District of Kansas on the merits of the value phase (App. A28) is reported at 393 F. Supp. 949. The opinion of the Court of Appeals for the Tenth Circuit on the merits of the value phase (App. A1) is reported at 666 F.2d 1279.

JURISDICTION

The judgments of the Tenth Circuit Court with respect to the value phase were entered November 16, 1981. Timely petitions for rehearing and suggesting for rehearing en banc filed by the Helex Group and by the United States Government were denied on January 19, 1982, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are set out in the appendix to this petition the following provisions:

Constitution of the United States, Fifth Amendment. (App. A539).

Natural Gas Act, 15 U.S.C. § 717 *et seq.* (App. A539).

Helium Act Amendments of 1960, 50 U.S.C. § 167i. (App. A540).

STATEMENT OF THE CASE

This petition for certiorari is to determine whether an appellate court may substantially impair contract obligations, substitute its own scheme of rate making, create contract rights in others unintended by the contracting parties, and make findings of fact and conclusions of law totally inconsistent with the facts introduced at the trial and found by the trial court, and contrary to the applicable state law.

Congress enacted the Helium Act Amendments of 1960, 50 U.S.C. § 167 *et seq.* authorizing the Secretary of the Interior to develop a helium conservation program so that this national resource would not be lost. Pursuant to the Helium Act Amendments, the Secretary entered into helium supply contracts in 1961 with four companies including the petitioner, National Helium Corporation (National Helium). Each of the four companies under its respective contract with the Government was to build one or more helium extraction plants and then to sell the extracted but unrefined helium to the Government. The price to be paid varied from contract to contract but

the Government endeavored to negotiate the price in each contract on the basis of the estimated cost the Government would incur if it built and operated its own plants. As one of the Government's price negotiation considerations, it included in its cost buildup a payment of $2.00 per 1,000 cubic feet (Mcf) as an estimated price it would pay for helium delivered to a Government extraction plant. This $2.00 figure does not appear in any contract with the Helex Group and was in evidence only as one of the considerations taken into account by the Government in its price negotiations. The figure reflects no more than an estimate by the Bureau of Mines of what it would cost the Government to acquire extraction rights from natural gas belonging to others for use in a Government plant. *Northern Natural Gas Company v. Grounds*, 292 F. Supp. 619, 657 (D. Kan. 1968). (*Grounds I*) (App. A238).

Each of the Government contracts had a price stated in two parts. The first part represented the cost of gas, *i.e.*, the cost of the shrinkage of the natural gas occurring as a result of the helium extraction and of any natural gas consumed as fuel in the extraction process. In the case of National Helium, this price for the helium and other shrinkage and for the fuel gas was stated in the Government contract to be 91 cents per Mcf (App. A627), which is noticeably less than the $2.00 estimate of the Bureau of Mines. The second part represents the balance of the price to be paid for the helium delivered to the Government.

The natural gas involved was produced in four states, Texas, Kansas, Oklahoma and Colorado. The gas was transported in interstate pipelines by Panhandle Eastern Pipe Line Company (Panhandle) to National Helium's helium extraction plant, which was built near Liberal, Kansas, after the Government contract had been executed. Panhandle was a producer of some of the natural gas and

acquired the balance of the feed stock gas through gas purchase contracts with various other producers. Some of these gas purchase contracts specifically recognized that helium was a valuable commodity and the parties contracted with respect to the helium and the rights and obligations pertaining thereto. (App. A578-A610). In particular, after the execution of the Government supply contract, Panhandle executed contracts with certain producers which reserved the right in the sellers to extract the helium for their own account. If they failed to do so, they would waive any further claim to the helium except to receive the purchase price of the helium constituent which would be the same as for the balance of the natural gas stream. Another major Panhandle purchase contract with a producer released Panhandle from all claims of any nature from the beginning of the world to the date of the release, which included claims for helium. (App. A610).

The present litigation originated as six cases in the nature of interpleader. The cases have come to be known as the "Consolidated Helium Cases" and have been referred to at times by the courts as the "Grounds" cases. The interpleader cases were brought to determine the rights to proceeds from the crude helium processed in the Kansas plants and sold to the United States Government pursuant to the conservation contracts.

The trial court in *Grounds I* held that the leases conveyed title to the helium constituent from the landowners to the producers and that the gas purchase contracts conveyed title from the producers to the pipeline companies. Accordingly, the court awarded the interpleader funds to the Helex Group and dismissed the landowners' claims against the United States.

The Tenth Circuit Court, while agreeing with the District Court that title to the helium passed under the leases

and again under the gas purchase contracts, nevertheless held that the contract provisions for the price of helium were of no effect, and that the producers were entitled to recover a reasonable value for the helium content of the natural gas which they had produced and the landowners were entitled to receive royalties on the value of the helium produced from their land. *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 (10th Cir. 1971). (App. A133). The Tenth Circuit denied motions for rehearing on May 20, 1971, and the Supreme Court thereafter denied certiorari. *Grounds v. Northern Natural Gas Co.*, 404 U.S. 951 (1971); *Northern Natural Gas Co. v. Mobil Oil Corp.*, 404 U.S. 1063 (1972). Justices Stewart and Blackmun voted to grant certiorari.

Shortly before the trial to determine value, the holding of the Tenth Circuit Court in *Grounds I* was amplified by the Supreme Court in *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974). (App. A494). In *Texaco* this Court examined the Tenth Circuit opinion in *Grounds I* and held that the claim there asserted for the reasonable value of helium was an action in quantum meruit under state law and not a cause of action predicated on federal law. This Court, in so holding, reversed the Tenth Circuit Court in *Texaco*.

The Tenth Circuit in *Grounds I* remanded the consolidated interpleader cases to the trial court to determine the "reasonable value at time of sale of the helium content of the natural gas the Helex Group has received from the lessee-producers and which has been processed in the plants of the Helex Group for the separation of helium from natural gas". (App. A354, A357). *Grounds II* was tried to the court based upon the record in *Grounds I*, as far as relevant, and 22 days of submissions of additional evidence. *Northern Natural Gas Company v. Grounds*,

393 F. Supp. 949 (D. Kan. 1974). (App. A28). The trial court searched for the reasonable value of helium in the various states and markets. In addition to contractual evidence, it fully considered evidence offered by the lessee-producers and extractors concerning markets for and costs of extracting helium. From that extensive evidence the trial court rejected lessee-producers' sole theory of value arrived at by use of a "proceeds less expense" approach. The trial court found that the amount claimed exceeded the amount the United States paid the extractors, hence exceeded the fund over which it had jurisdiction. The trial court, contrary to the lessee-producers' contention, found that "there were markets for the commingled helium as it passed from the wellhead to the pipeline companies" (App. A100) and based upon a review of all of the evidence found that, at the point of sale and delivery from the producers to the respective pipeline companies, the helium content had a value of $.60 Mcf to $.70 per Mcf during the period in question. (App. A105).

On appeal, the *Grounds II* case was consolidated for the purpose of oral argument to the court en banc (App. A340) with *Ashland Oil, Inc. v. Phillips Petroleum Co.*, a case appealed from the United States District Court for the Northern District of Oklahoma reported at 364 F. Supp. 6 (N.D. Okla. 1973) (*Ashland I*). (App. A468). *Ashland I* involved a claim for the reasonable value of helium produced in two plants in Texas. The facts of the *Grounds* and *Ashland* cases were, however, greatly dissimilar. There were different parties and the evidence on value introduced in each case was also substantially different. The cases were not consolidated for the purpose of making a determination of value or of judgment.

On appeal in *Ashland I*, the Tenth Circuit in an en banc opinion held that a work-back valuation method (price less cost of beneficiation) was the proper method

to use in determining the value of the helium constituent at the point and time of delivery. *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 554 F.2d 381 (10th Cir. 1977), *cert. denied*, 434 U.S. 921 (1977). (App. A429). The court remanded the case to the District Court for taking additional evidence. *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 463 F. Supp. 619 (N.D. Okla. 1978) (*Ashland II*). (App. A390). On appeal, the Tenth Circuit affirmed the value of $3.00 per Mcf arrived at by the District Court but remanded for an entry of judgment to include prejudgment interest. *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 607 F.2d 335 (10th Cir. 1979). (App. A385).

Nothing further occurred in *Grounds II* until after *Ashland II* had been considered by the Tenth Circuit. *Ashland I* and *Grounds II* had been argued to the Tenth Circuit on November 16, 1976, and the court filed its opinion in *Grounds II* five years later, *i.e.*, November 16, 1981. In the interim, without any notice to the parties, the court placed *Grounds II* on an "abated status" and then, by an order dated May 11, 1981, removed it from the en banc court and referred it to a three judge panel. (App. A330).

On November 16, 1981, the panel issued its decision in *Grounds II*, setting aside the valuation determination made by the District Court. *Northern Natural Gas Company v. Grounds*, 666 F.2d 1279 (10th Cir. 1981). (App. A1). The panel held that *Ashland* "was the law of the case" and that the work-back method was to be used to determine the reasonable value of helium content of the natural gas. This order was made notwithstanding extensive findings of fact by the trial court that such method in the *Grounds* cases was incapable of reasonable application. The court's decision did not refer to the

contract provisions between the lessee-producers and the Helex Companies. The opinion further directed the District Court to make a value determination based upon the work-back method, subject to a $2.00 per Mcf "floor" or minimum payment.

On January 19, 1982, the Tenth Circuit Court denied petitions for rehearing and suggestion for rehearing en banc filed by the Helex Group and by the Government. (App. A512).

REASONS FOR GRANTING THE WRIT

A. The Tenth Circuit Court Has Disregarded An Act Of Congress, And The Holding Of This Court In *Phillips Petroleum Company v. Texaco*, By Creating A Utility Type Rate Making Scheme, Voiding Contract Rights Of Petitioners In Violation Of Their Due Process Rights.

If the opinions of the Tenth Circuit Court are allowed to stand, Petitioners will be deprived of their contractual rights under two classes of contracts. The first class of contracts consists of the gas purchase contracts with producers executed after the enactment of the Helium Act Amendments of 1960, which contracts deal specifically with the helium constituent. The second class of contracts consists of the gas purchase contracts with producers - typical of those used in the industry - which have no special provisions relating to helium. The Tenth Circuit Court in *Grounds I* held the gas purchase contracts of both classes vested title in the pipeline companies to the helium constituent along with the rest of the gas stream. (App. A158). Yet, the Tenth Circuit held in *Grounds I & II* that both classes of contracts are void insofar as they provide for the purchase and sale of helium. The court reached this extreme conclusion by finding that a void exists be-

tween the Natural Gas Act, which gave the Federal Power Commission jurisdiction, *inter alia*, over the sale of natural gas for resale, and Section 11 of the Helium Act Amendments of 1960 which provides that the Natural Gas Act:

> shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas. . . . (App. A550).

Thus, the Tenth Circuit concluded in *Grounds I*:

> In our opinion the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the conclusion that the FPC service rates do not apply to deny recovery for the contained helium which is processed in the separation plants. Hence, the lessee-producers recover from the fund the reasonable value of the helium content of the processed gas and they in turn must pay royalty thereon to the landowners.

(App. A168).

The court found that this result was necessary for "satisfactory utility regulation." It is obvious that the Tenth Circuit felt it was dealing with the issue of rate regulation and not contract law. This is further apparent in its rejection of the moral of the folk tale of the Little Red Hen in the following words:[2]

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2. In support of the principle that equity does not take from those who earn it and reward those who silently stand aside and await the success of the enterprise, the Helex Group cited as authority the folk tale of the Little Red Hen. As quoted in the brief of the Helex Group: "You remember that I planted the wheat, and cut it, I threshed it and carried it to mill, I made the bread and baked it—and now all of you would help me eat it! No, indeed." V. S. Hutchinson, Chimney Corner Stories, 63, 65 (1925).

> The activities of the Little Red Hen were not those of a public utility, and neither the product nor the ingredients thereof were subject to governmental rate regulation. Therein lies the difference. . . . In our opinion private contract law and the principles applicable thereto are not controlling.

(App. A166).

Amplifying the decision of the Tenth Circuit in *Grounds I*, this Court held in *Phillips Petroleum Co. v. Texaco, Inc.*:

> In other words, the Grounds case simply held that payment for natural gas at rates established or permitted by the Commission under the authority of the Natural Gas Act will not be regarded as payment for the helium constituent and cannot be asserted as a defense to a suit for the recovery of the value of that helium. . . .
>
> Texaco's suit for the reasonable value of the helium is, in effect, an action in quantum meruit, whose source is state law and not federal law.

(App. A499-500).

Thus, it would seem clear that while the Tenth Circuit has treated the cases as though they involved complex federal regulatory or utility issues, they in fact are simple cases involving quantum meruit under Kansas law. Notwithstanding the clear holding of this Court in *Texaco*, the Tenth Circuit in *Grounds II* treated the cases as if they were federal regulatory cases and provided a framework for price regulation, *i.e.*, a work-back valuation method with a $2.00 floor and a utility type rate of return to the pipelines and helium extractors. (App. A27).

In so holding the Tenth Circuit succeeded in accomplishing the judicial regulation of a commodity which Congress had stated in Section 11 of the Helium Act Amendments was not to be regulated under the Natural Gas Act. Moreover, by its failure to provide any other regulatory mechanism, Congress indicated that such commodity should be free of regulation.

Not only is there a lack of statutory authority for utility type rate regulation of helium, there is likewise no federal common law applicable thereto. In a very recent case this Court held unequivocably that there is no federal common law except in two special areas not here involved. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 450 U.S. 905 (1981). In the absence of any federal law, the state law must govern, whether statutory or common law.[3]

Since the Kansas Legislature has not elected to regulate helium, the decision of this Court in *Phillips Petroleum Co. v. Texaco, Inc.* applies, and the action is one under quantum meruit. The common law principle of quantum meruit does not permit recovery where rights are already protected under an express contract. *Hillyer v. Pan American Petroleum Corporation*, 348 F.2d 613,

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3. The situation in *Grounds* is analogous to the issue presented in *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U.S. 507 (1947). In that case, this Court held that neither the commerce clause of the United States Constitution (Art. I, §8), nor the Natural Gas Act, prevented the operation of state law in areas of natural gas regulation not specifically preempted by the federal government. This Court said, "We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority." *Id.* at 520. This Court also observed, "The attractive gap which appellant has envisioned in the coordinate schemes of regulation is a mirage." *Id.* at 524. *See also Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1949); *Rice v. Board of Trade of City of Chicago*, 331 U.S. 247 (1947).

623 (10th Cir. 1965). Kansas follows the common law except as to those particular principles of that law that are abrogated by statute. *In re Frye*, 173 Kan. 392, 396, 246 P.2d 313 (1952). Thus, there can be no recovery under quantum meruit in the present case because the matters in issue are covered by express written contracts.

The principle of quantum meruit as applied under Kansas law clearly prohibits recovery as to the first class of contracts, which were agreed upon after arms-length negotiations. The language in each of these contracts is clear and unambiguous. Typical of the pertinent language in these contracts is that found in the contract with Cities Service Oil Company. The trial court's decision described it as follows:

> In Contract No. 152, the producers [Cities Service Oil Company] retained the option of extracting helium and liquefiable hydrocarbons, and promised that: "In the event Seller does not extract helium at the plant site or sites . . . or prior to initial delivery of gas to Buyer, Seller will release all further claim to helium contained in gas delivered to Buyer." [Contract No. 152, ¶12.3, p. 24]

(App. A112).

It is clear from the trial court's description that all of the sellers in this class of contracts were fully aware as of the time of executing them that helium had a value and that such lessee-producers for a valuable consideration paid by Panhandle agreed to either extract the helium or forego any claim against Panhandle for the value of the helium, accepting therefor the same price as for the other constituents of the natural gas stream. The trial court, however, did not enforce the clear language of the contracts, because of its belief that the opinion of the Tenth Circuit in *Grounds I* prevented it from doing so. (App. A113).

The Tenth Circuit Court in *Grounds II* also refused to consider the specific contract language. Although Petitioners urged such failure as the prime reason for granting rehearing (App. A523), the Tenth Circuit Court continued its persistent refusal to deal with the contractual provisions disposing of the helium issue.

Under another gas purchase contract, Hugoton Production Company gave Panhandle an unconditional release in exchange for a valuable consideration. (App. A610). The effect of the Tenth Circuit Court holding is to void the release. The release was executed on May 1, 1967, long after the passage of the Helium Act Amendments of 1960 and long after the extraction of helium had commenced. Hugoton Production and Panhandle had numerous claims and disputes with each other and this settlement was clearly intended, as evidenced by its unambiguous language, to release Panhandle:

> from all, and all manner of, action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, trespasses, judgments, executions, claims and demands whatsoever, in law or in equity, that the said Hugoton now has, ever had, or may have by reason of any matter, cause or thing whatsoever from the beginning of the world up to and including the end of the day upon which this release is dated.

(App. A610-11).

If this release does not effectively release Hugoton Production Company's claim to be reimbursed for helium in the gas delivered to Panhandle, it would be impossible to prepare a release which would do so.

The rationale for recognizing the validity of the contracts insofar as they refer to helium is equally applicable to the second class of contracts which, though not mentioning helium, do in fact pass title to the helium constituent. Panhandle's gas stream contains approximately .4% helium. The effect of this Court's holding in *Phillips Petroleum Co. v. Texaco, Inc.* is that the FPC service rates apply only to the other 99.6% of the stream. By what authority may the Tenth Circuit disregard the price which the parties expressly agreed would apply to the .4% helium as well as to the remainder of the full stream? We urge that in light of *Texaco* the appropriate price for the helium would be .4% of the contract price—and this without regard to what has been paid for the regulated 99.6% of the stream. To hold that petitioners must pay some other price to be determined by the court based on "work-back" and allowing a return on investment is to engage in a type of utility rate regulation not authorized by Constitution, statute, or common law.

We suggest that in both classes of contracts, Panhandle and the producers were free to contract. Neither the Natural Gas Act nor the Helium Act Amendments of 1960 purported to preempt that activity or to make contracting with respect to helium illegal or ineffective. To deprive the parties of rights obtained by such proper commercial activities is to take their property without due process of law—the only process involved being that of unauthorized rate making by the courts.

The Fifth Amendment to the U.S. Constitution provides that no person shall be "deprived of life, liberty, or property without due process of law." This Court has declared on many occasions that contract rights are property rights entitled to protection under the Fifth Amendment. *Lynch v. United States*, 292 U.S. 571 (1934). Fun-

damental fairness requires that the facts of each materially involved transaction be specifically examined and decided. The issues concerning the facts of petitioner's contracts have never been decided and petitioners have been denied their due process rights. See *Morgan v. United States*, 298 U.S. 468, 478-82 (1936).

B. The Circuit Court Should Not Be Permitted To Write Contracts De Novo For The Benefit Of Third Parties When The Trial Court Did Not Consider Such A Theory And The Trial Court's Findings Of Fact Directly Negate The Application Of Any Such Theory.

(1) The Circuit Court Blatantly Violated Rule 52(a) Of The Federal Rules Of Civil Procedure.

The Tenth Circuit Court held that the contracts between the Government and the helium extractors, including National Helium's contract, created contracts for the benefit of third party producers and landowners to the extent of agreeing to pay such producers a minimum price of $2.00 per Mcf for the helium. (App. A18). The trial court had determined that the $2.00 figure was merely an estimate of the cost of helium to the Government if the Government should decide to build its own plant rather than contract with the Helex Companies for such helium. The entire finding of fact on this matter is stated in the trial court's opinion in *Grounds I* as follows:

> The United States negotiated the above unit prices in each contract on the basis of costs comparable to those it would incur in a government-owned plant located at the same place and in the same circumstances, adding thereto those costs of doing business applicable only to private industry, the cost of taxes, insurance, and a return on private capital. As one of the costs

> of operating a government-owned plant, the United States included in its cost build-up a payment of $2.00 for helium contained in natural gas delivered at the extraction plant for processing. This separation of two dollars of the unit price as applicable to the cost of helium contained in natural gas to be processed for its extraction does not appear in any contract itself. It appears only in evidence which reflects the manner in which the United States reached its own cost estimates to form a basis for actual contract negotiation. *The figure reflects no more than the estimate of the Bureau of Mines of the cost it would probably incur, in the operation of its own extraction plant, to acquire helium extraction rights from a natural gas stream.* (Emphasis added).

(App. A238-39).

The trial court never considered a third party issue or theory and no evidence was introduced as to the intent of the parties to create a third party beneficiary contract. The contracts themselves made no mention of this $2.00 figure or of any third party beneficiary. (App. A613).

The contracts did reflect that the Government was paying National Helium 91 cents per Mcf for the helium and other shrinkage and for the fuel gas. (App. A627). This sum is substantially less than the $2.00 per Mcf price seized upon by the Tenth Circuit.

It is obvious from the foregoing that the Tenth Circuit has de novo created a contract for the benefit of the producers and landowners. This is not permitted under Rule 52(a) of the Federal Rules of Civil Procedure. That rule states in relevant part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts

> specially and state separately its conclusions of law thereon. . . . Findings of fact shall not be set aside unless *clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. (Emphasis added). (App. A553).

Thus, the findings of fact by the trial court are deemed to be presumptively correct.

In determining whether the findings of fact of the trial court are "clearly erroneous", an appellate court cannot consider and weigh the evidence de novo. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Wright and Miller Federal Practice and Procedure: Civil § 2585 (1971). Additionally, the mere fact that on the same evidence the appellate court might have reached a different result does not justify setting aside the findings of fact of the trial court. *Bianchini v. Humble Pipe Line Company*, 480 F.2d 251 (5th Cir. 1973). As stated by the court in *Panaview Door & Window Co. v. Reynolds Metals Co.*, 255 F.2d 920 (9th Cir. 1958): "The Federal Rules of Civil Procedure give this Court no power to make new independent findings upon evidence which *this* Court did not hear. Trial de novo is not permitted under our present system, except perhaps in admiralty." *Id.* at 926. (Emphasis added).

(2) The Circuit Court Ignored Applicable Kansas Law With Respect To Third Party Beneficiary Contracts In Violation Of *Erie R. Co. v. Tompkins*.

No federal statute creates a contract for the benefit of the producers and landowners and the Tenth Circuit Court may not under the guise of federal rate making, or through creating a federal common law, provide such

a contract for the benefit of third parties. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 450 U.S. 905 (1981).

Under applicable state law which was not considered by the Tenth Circuit Court and which must be applied under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), there could be no contract for the benefit of the producers and landowners.

The test for determining the existence of third-party beneficiary contracts has long been established in the State of Kansas. Both parties must have intended to make a contract for the benefit of a third party. *Burton v. Larkin*, 36 Kan. 246, 13 P. 393 (1887). In the instant case, there was no evidence that either party intended a contract for the benefit of the landowners or producers.

It is not proper for a court to imply a contract for the benefit of a third party. The intent to benefit a third party must be clearly expressed in the contract. As is stated in *Martin v. Edwards*, 219 Kan. 466, 473, 548 P.2d 779 (1976), "Contracting parties are presumed to act for themselves and therefore an intent to benefit a third person must be clearly expressed in the contract." There was nothing in the involved contracts between the Government and petitioner National Helium stating any intent to benefit any third parties.

The burden of proving the existence of a third party contract rests with the third party seeking to benefit from the contract. *Hartford Fire Ins. Co. v. Western Fire Ins. Co.*, 226 Kan. 197, 597 P.2d 622 (1979). The claimants here introduced no evidence in the trial court that the contract between the Government and petitioners was for their benefit. The trial court made no findings of fact reflecting any intention on the part of the contracting parties to benefit any third parties.

Under the facts of this case, as determined by the trial court and under the applicable law of the State of Kansas and elsewhere, there was no contract for the benefit of third parties and the holding of the Tenth Circuit Court in creating such a contract violates the doctrine of *Erie R. Co. v. Tompkins.*

C. The Circuit Court, Whether Through The Rationale Of The "Law Of The Case Doctrine" Or Otherwise, Should Not Be Permitted To Apply Findings Of Facts And Conclusions Of Law Determined In One Case To Another Case Where:

(1) The Parties Involved In The Two Cases Are Not The Same;

(2) The Factual Considerations Of The Two Cases Are Vastly Different.

The Tenth Circuit Court completely disregarded comprehensive findings of fact by the trial court, including a finding that the work-back method urged by the lessee-producers was unreasonable as a determinant of value. The Tenth Circuit Court held that the work-back method used to determine the value of the helium involved in the proceeding in *Ashland I* must be applied in this case under the theory of the "law of the case". (App. A13).

The "law of the case" doctrine concerns the continued application of a rule of law previously determined in a case at bar and could have no application to methods of determining value in two different cases. *Chicago, Rock Island & Pacific Railroad Co. v. Hugh Breeding, Inc.*, 247 F.2d 217, 223 (10th Cir. 1957); *Champlin Refining Co. v. Commissioner of Internal Revenue*, 123 F.2d 202, 204 (10th Cir. 1941); *White v. Murtha*, 377 F.2d 428, 431, 432 (5th Cir. 1967); 1B, Moore's Civil Procedure, § 0. 404(1), 403.

The parties in the present case are different from the parties involved in *Ashland*. *Ashland* involved only approximately 18 wells in Texas, all within close physical proximity of one another. (App. A472-A484). The present case involves far in excess of one thousand wells spread over a four state area. (App. A39-A98). The natural gas produced from the Ashland wells had high contents of helium and were piped to two plants both owned by a single operator. (App. A472-484). The gas from the wells in the present case have a wide variation in helium content, the average content is far less rich and the gas is transported long distances to several different plants with different owners and with different capital investments and operating costs. (App. A39-A98). The evidence introduced at the two trials demonstrated vastly different facts affecting the value of the helium involved. It is apparent that the application of the work-back valuation method would result in a different value being established for the helium produced at each plant, a bizarre result indeed.

Judge Doyle, in his dissenting opinion in *Ashland I*, noted that the trial record in *Grounds II* was superior to th produced in *Ashland I*. (App. A466). Thus, we sugg the District Court was correct in its conclusion that the facts in *Grounds II* proved the existence of a market for helium at the point and time of delivery. From these facts, the trial court could and did determine the reasonable value of the helium constituent. (App. A100).

All of the differences in parties and facts from *Ashland* to *Grounds* make it clear that the application of the "work-back" method as determined to be the "law of the case" in *Ashland* is totally unreasonable and impossible of uniform or fair application in this case. This would be true

whether the court denominates the doctrine as "law of the case" or "stare decisis" or otherwise. The rights of the parties in this case cannot be fairly determined in another case where the controlling law, facts, and the parties are not the same. *Champlin Refining Co. v. Commissioner of Internal Revenue,* 123 F.2d 202, 204.

While we have demonstrated in Part A hereof that no further valuation of helium is required in light of the express contracts, we urge that if valuation is to be undertaken the method utilized by the trial court in *Grounds II* is the most appropriate method. It accommodates the facts determined by the trial court. Further it is totally improper, as the Tenth Circuit Court has ordered, to determine a quantum meruit value based on costs or on some rate of return on investment. The proper issue is the reasonable market value. This is what the trial court determined. See *Cities Service Gas Co. v. United States,* 580 F.2d 433, 440 (Ct. Cl. 1978); *Cities Service Gas Company v. United States,* 500 F.2d 448, 457 (Ct. Cl. 1974).

CONCLUSION

The present litigation involves only helium sold to the United States for conservation purposes. There remain pending in federal and state courts a number of cases involving the same issues with respect to private sales of helium. The litigants in those cases would benefit from a clarification by this Court of the issues presented herein.

Petitioners concur in the argument made by the Cities Service Companies in their petition for certiorari filed in this cause contemporaneously herewith concerning the error of the Tenth Circuit Court of Appeals in abating

the cases and terminating the en banc court 4 1/2 years after submission without notice and hearing. For those reasons and for the reasons set out herein, this petition for certiorari should be granted.

Respectfully submitted,

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